In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4049

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a corporation,
Plaintiff in Error

vs.

JAMES ROMAN, Administrator of the Estate of Edgar Roman, Deceased, *Defendant in Error*

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF PLAINTIFF IN ERROR

W. H. BOGLE
LAWRENCE BOGLE
F. T. MERRITT
LANE SUMMERS
E. I. JONES

ATTORNEYS FOR PLAINTIFFS IN ERROR

609-16 CENTRAL BUILDING, SEATTLE, WASHINGTON

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4049

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a corporation,
Plaintiff in Error

vs.

JAMES ROMAN, Administrator of the Estate of Edgar Roman, Deceased, *Defendant in Error*

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE

This cause comes here on a writ of error sued out by the defendant below in two consolidated causes brought by the plaintiff below, as administrator of the estate of Edgar Roman, deceased, son

of said plaintiff, to reverse the judgments rendered against defendant below for the sums of four thousand dollars in one cause, and one thousand dollars in the other cause, in two actions at law, for the recovery of damages for the death of said Edgar Roman alleged to have been caused by reason of the negligence of the defendant. For convenience in this brief the parties will be referred to as designated in the court below.

There is practically no dispute as to the material facts in this case. The place where the accident happened was in the switch yard of the defendant near Argo station in the City of Seattle. The particular track upon which the accident occurred was track No. 12, which at that time and at all times since its construction was used extensively by the defendant for the storage of cars and for cleaning out same. (R. p. 113.) The nearest public crossing of said tracks is First avenue, about a city block west of the place of the accident where the street crosses the track in question and the yard of the defendant by an overhead trestle. Within the railroad yard and to the north of said track No. 12 is a portion of a dump pile created by the city in dumping refuse on the low land at said place. To the south of said track No. 12 at

the place in question is a large open field over which there are many paths, one of which runs to the railroad right of way in the vicinity of the accident. It is the contention of the plaintiff, testified to by several witnesses, that the last-named path had existed there for many years, and had been used quite extensively by various people living south of the track as a convenient passage to the dump pile. There is, however, no testimony—with the exception of that of one William Barr, who had not worked for the defendant for four or five years previous to the accident—that the defendant, its agents or employees, knew of the existence of the path or of the custom of people using the same. There is no contention whatever on the part of the plaintiff that there was any invitation, express or implied, held out by the defendant to anyone using the path, and the evidence showed beyond any question of a doubt that all used it for their own personal convenience.

At the time of and for some time prior to the accident, the plaintiff, together with his wife and seven children, resided about three-quarters of a mile (R. p. 85) south of the place of the accident, but only three blocks from the defendant's tracks and roundhouse. (R. p. 87.) For about

a year previous to the accident, plaintiff, his wife and his two boys—Edgar, deceased, aged twelve years, and Charles, aged nine years—had been using the path in going over to the dump pile to get wood for fuel. (R. p. 88.) The plaintiff testified that he went there first and then showed the boys where the wood was located, after which time the boys hauled most of the wood under his direction. Many times the mother accompanied the boys. (R. p. 108.) The father's testimony was to the effect that when their passage over the track was barred by cars, if it was inconvenient to walk to the end of same, he and the boys crawled over the couplings or drawheads between the cars. (R. p. 87.) The mother's testimony was almost identical with that of the father's except that she said that she and the boys sometimes crawled underneath the couplings between the cars. (R. p. 107.)

On the afternoon of May 19, 1922, the two boys, Edgar and Charles, went to the track with a wheelbarrow to get wood. When they reached the track there was a string of cars on the same, the westerly end of which extended for almost a car length across the place where the path was alleged to intersect the track, and the easterly end of which

could not be seen, as there were fifty-seven cars in the string, making a line over one-half mile in length.

The boys, with their wheelbarrow, went westerly along the track until they reached the very end of the last car, the one which barred their way, then attempted to cross the track, with Edgar between the handles pushing the wheelbarrow, and Charles at the wheel, lifting or rolling it over the rail. They succeeded in getting it over the first rail, and as they were endeavoring to get it over the second, with Edgar between the handles and standing right up against the rear of the car, an engine at the easterly end of the cars shoved them with sufficient force, to close one or two gaps in the string so that they could get another car or two on the track, with the result that the rear car moved back about two feet (R. p. 94), knocking Edgar down, the wheels running upon his legs and then off again. One leg was so badly injured it was necessary to amputate the same, with the result that the boy died on May 22, 1922.

There are three complaints on file in each case. (R. pp. 2, 7, 25, 30, 35, 41.) After the first complaints were filed and during the trial of the causes, the trial court called the attention of the

attorneys for the plaintiff to the fact that the plaintiff in each action had no capacity to sue. Counsel for plaintiff then filed amended complaints, changing parties plaintiff in each suit. (R. pp. 77, 78.)

After the cases were tried and the verdicts entered, and after judgment was entered in one case, counsel for plaintiff filed second amended complaints, making the administrator the party plaintiff in each action.

The question involved in this statement of facts and presented here by the assignments of error, together with the manner in which these questions are raised on the record, are as follows:

I

Defendant will contend that no negligence is shown, either as alleged or otherwise, on the part of the defendant, and therefore there could be no recovery in these cases.

This question is raised upon the record by assignment No. III (R. pp. 158, 159, 110) and assignment No. IV. (R. pp. 159, 160, 135, 136.)

II

That the contributory negligence of the decedent and of his parents was the proximate cause of the injuries which the decedent received, and therefore there could be no recovery in these cases.

This question is raised upon the record by assignment No. III (R. pp. 158, 159, 110), and assignment No. IV. (R. pp. 159, 160, 135, 136.)

III

That the trial court committed prejudicial error in permitting the witness W. H. Barr to testify that he knew the public was crossing the track near the point of injury.

This question is raised on the record by assignment No. II. (R. pp. 157, 158, 97.)

IV

That the trial court committed prejudicial error in refusing to give the instruction requested by the defendant as to the deviation from the alleged footpath in crossing the switch track.

This question is raised upon the record by assignment No. V. (R. pp. 160, 161, 147, 148.)

V

That the trial court erred in rendering and entering judgments in said actions, for the reason that all of the complaints in said action were fatally defective.

This question is raised upon the record by assignment No. VI. (R. pp. 161, 2 to 11 inclusive, 25 to 45 inclusive.)

SPECIFICATIONS OF ERROR RELIED UPON

I

The court erred in permitting the witness W. H. Barr, for plaintiff, to answer the following question propounded by plaintiff's attorney to him: "Did you have any knowledge that the public was using the path," and in not sustaining the objection of the defendant thereto; said question and the testimony sought to be elicited was immaterial, for the reason that the witness—as shown by his testimony—had not worked for the defendant for four or five years previous to the accident upon

which the said actions are based. The answer of the witness to the question above was, "Yes, sir." (Assignment No. II, R. pp. 157, 158, 97.)

II

The court erred in not granting the motion of the defendant for a nonsuit for the following reasons:

(a) That there was a material variance between the complaints and the proof thereof, in that all the complaints alleged that at the time of the accident "there were standing on said track No. 12 and commencing about 4 feet east of said path and extending eastward about 2,800 feet, some 57 cars belonging to the defendant corporation," when the evidence of the plaintiff conclusively showed that the last car in the string extended over said alleged path for a distance of almost its entire length.

(b) That the testimony did not show that said defendant company was guilty of any negligence sufficient to entitle the plaintiff to recover.

(c) That the plaintiff's evidence established that decedent Edgar Roman's injuries were caused solely by his own negligent acts and omissions, which

directly contributed thereto, in attempting to cross the defendant's switch track at the place where he was injured, there being on the track a car directly in front of him, so that he was obliged to walk westward almost the entire length of the car, and in then attempting to cross immediately at the very end of the car.

(d) That the plaintiff's evidence further established negligence on the part of the plaintiff and his wife, the parents of the decedent, which directly contributed to the injuries, in that when they accompanied the decedent and his brothers to the place of the accident on previous occasions, they ordered and permitted the decedent and the others to climb over and under the couplings between the cars, and on the occasion of the accident, they allowed the decedent to cross over the track at the place of the accident unaccompanied by them, or either of them, or at all. (Assignment No. III, R. pp. 158, 159, 110.)

III

The court erred in not granting defendant's motion for a directed verdict:

(a) For the same reasons given in subdivision (a) of assignment No. III.

(b) For the reason that the evidence was insufficient to justify the verdict against defendant.

(c) That the evidence did not show that the said defendant was guilty of any negligence sufficient to entitle the plaintiff to recover.

(d) That the evidence established that the decedent Edgar Roman's injuries were caused solely by his own negligent acts and omissions, which directly contributed thereto, in attempting to cross the defendant's switch track at the place where he was injured within the defendant's switch yards, there being at that time on said track a car directly in front of him, so that he was obliged to walk westward almost the entire length of said car, and in then attempting to cross immediately at the very end of said car, said car being at that time and place one of a long string of cars attached together, the eastward end not being visible to the decedent and his brother.

(e) The evidence further established without question negligence on the part of the plaintiff and his wife, the parents of the decedent, consequent beneficiaries under these actions, which negligence directly contributed to the injuries, in that when they accompanied the decedent and his

brothers to the place of the accident on previous occasions, they ordered and permitted said boys to climb over and to crawl under the couplings between the cars, and on the occasion of the accident, they allowed the decedent and brother to go upon the switch track unaccompanied by them, or either of them, or at all. (Assignment No. IV, R. pp. 159, 160, 135, 136.)

IV

The court erred in refusing to give the instruction requested by the defendant which reads as follows:

"The court instructs you that if you find from the evidence that a footpath across defendant's track No. 12 was acquired by user and that a person traveling on same across said track was not a trespasser, you are further instructed that any material deviation from said footpath in crossing said track would constitute the party making such deviation in crossing said track a trespasser thereon;"

for the reason that such instruction was in accordance with the law and under the facts of the cases, and for the reason that the decedent departed so far from the alleged path as to make it a question for the jury to determine whether or

not his status had been altered from a licensee to a trespasser. (Assignment No. V, R. pp. 160, 161, 147, 148.)

V

The court erred in rendering and entering any judgment in favor of plaintiff and against the defendant in said causes, for the following reasons:

(a) That the plaintiff in said causes had no capacity to sue.

(b) That the filing of the second amended complaint in cause No. 7018, did not aid the verdict and judgment theretofore rendered and entered.

(c) That none of the complaints in said causes stated facts sufficient to entitle the plaintiff, or plaintiffs, to any judgment against the defendant.

(d) That the alleged cause of action in the amended complaint in cause No. 7018, is the same as set forth in the amended complaint in cause No. 7019. (Assignment No. VI, R. pp. 161, 2 to 11 inclusive, 25 to 45 inclusive.)

ARGUMENT

I

No Negligence is Shown, as Alleged or Otherwise

The negligence charged in the complaints against the defendant was, that there was no employee stationed on or near the cars; that no warning was given that the cars were to be moved, and that it and its employees bumped one of the engines at the eastern end of the line of cars, causing the accident, which resulted in the death of the boy. If the defendant was under no obligation whatever to give any warning as to the movement of its cars at that time and place this court need go no further in its consideration of this case.

It is conceded that the accident happened within the switch yard of the defendant. It is further conceded and conclusively shown that the Roman boys were upon the switch track by no invitation from the defendant, express or implied, but were using same purely for their own personal convenience. The most favorable status that could be given them—even though the court believes that

the track was used extensively in crossing the same by pedestrians—is that of naked licensees. The supreme court of the state of Washington has fixed their status beyond peradventure of a doubt, in the case of:

Olson v. Payne, 116 Wash. 381.

This case is so recent and so nearly parallel with the cases at bar, that we desire to call the court's particular attention to same. The plaintiff in said case was a boy, twelve years of age, and was injured by having been struck by a Great Northern Railway engine while traveling upon the right of way within the City of Everett, Washington. In this connection the court said:

"For many years pedestrians have been in the habit of traveling the right of way from the depot to the south, past the point mentioned and on toward the town of Lowell. The amount of such travel on the right of way was such that those operating the trains must have been aware of the custom."

The court further said:

"The chief question argued by both sides is as to whether the boy was guilty of such contributory negligence that, as a matter of law, and notwithstanding the verdict, we may say that he cannot recover. He is of average intelligence and experi-

ence. He has succeeded in making from year to year his various school grades. He was thoroughly acquainted with the immediate neighborhood where he was injured; he had been there and on those tracks a number of times, both alone and with his parents. He had some two or three years before lived within a block or two of a railroad. His parents had time and again warned him about the danger of being on the tracks. His age, his intelligence and his experience must have made him know as fully as anyone could know, that he was in a place of danger; that he must keep away from the trains; that he would be killed or hurt if he got too close to them. That he knew and fully appreciated these things is shown by the fact that when he first came to the tracks he looked in both directions to see if any trains were coming.

"Many, and probably a majority, of the courts of this country have held that a child five or six years of age or under, cannot, but that a boy of ten or twelve years of age may, under some circumstances, be guilty of such contributory negligence as will preclude recovery for his injury. The facts in any two personal injury cases are never the same. Each case must be decided upon its own peculiar facts. In determining whether this boy was guilty of such negligence as to preclude recovery, we must take into consideration his age, his intelligence, his experience and his knowledge of the surrounding circumstances. In so doing we must not hold the boy to that strict accountability to which we would hold one who had reached older years. But the matters for the respondent's con-

sideration to assure his safety were of the most simple and elementary nature. There were no other noises or trains to confuse; the situation was not such as to require a sudden election what course to pursue. It is true he says the whistle was not blown and the bell was not rung, although nearly everybody else testified to the contrary, yet the purpose of giving those signals is to warn. In this case we have a freight train of some sixty cars approaching him, laboring heavily to make a curve and gain speed. It does not need testimony, although there is plenty in the record, to inform us that, under those circumstances, the train must have made a great noise. The boy says that he did not hear the noise of the oncoming train, but if he was exercising such reasonable care as a boy of his age, experience and intelligence must, as a matter of law, exercise under like circumstances, he must have heard it. There was nothing here, so far as the testimony shows, to distract his attention. It seems impossible to look upon this case otherwise than that the respondent wholly failed to give any heed to his surroundings. We must, of course, hold that he must have exercised at least a small amount of care, and yet it seems to us that he did not use any.

"That court is justified, notwithstanding the verdict of the jury, under proper circumstances, in holding, as a matter of law, that a child twelve years of age has been guilty of such contributory negligence as precludes his recovery, is shown by the following citations, selected from many of like character: *McGee v. Wabash R. Co.*, 214 Mo. 530,

114 S. W. 33; *Studer v. Southern Pacific Co.*, 121 Cal. 400, 53 Pac. 942; *Texas & Pac. R. Co. v. Phillips*, 91 Tex. 278, 42 S. W. 852; *Schoonover v. Baltimore & Ohio R. Co.*, 69 W. Va. 560, 73 S. E. 266;*Kyle v. Boston Elevated R. Co.*, 215 Mass. 260, 102 N. E. 310; *Adams v. Boston Elevated R. Co.*, 222 Mass. 350, 110 N. E. 965; *Derringer v. Tatley*, 34 N. D. 43, 157 N. W. 811. In this connection we call attention to the notes commencing on page 10, L. R. A. 1917F; notes commencing at page 123 of the same volume, and notes commencing at page 172 of the same volume. The authorities are elaborately collected and digested in these notes. We have recognized the same doctrine in the case of *Oregon R. & Nav. Co. v. Egley*, 2 Wash. 409, 26 Pac. 973, 26 Am. St. 860, where we held that a boy nine and one-half years of age was, as a matter of law, guilty of such contributory negligence as to bar his recovery. See, also, *Clark v. Northern Pacific R. Co.*, 29 Wash. 139, 69 Pac. 636, 59 L. R. A. 508.

"A very conscientious study of the facts of this case leads us to the necessary and inevitable conclusion that, under all the circumstances, the respondent was, as a matter of law, guilty of such contributory negligence as bars his recovery. . . .

"Again, the respondent was but a naked licensee on appellants' tracks and he could recover only for wantonness or wilfulness on the part of the appellant. In this as well as in other regards this case is controlled by *Scharf v. Spokane Inland Em-*

pire R. Co., 92 Wash. 561, 159 Pac. 797, and cases there cited."

Such is the law of the state of Washington governing a situation almost identical with the one we find in the cases at bar.

That the Federal Courts apply the laws of the state in which causes of action of this nature arise, is well illustrated by the case of

Schmidt v. Pennsylvania R. R., 181 Fed. 83.

In that case the plaintiff, a boy of eight and one-half years of age, was injured while crossing tracks of the defendant between the cars of a parted freight train, at a point between certain streets in the City of Newark, New Jersey. It was at a point frequently used by pedestrians in crossing the tracks and to such an extent that two well defined paths led up to the track and converged at the path over which the boy traveled. This conditions had existed for several years and was well known. On the day of the accident, the plaintiff and a boy companion started to cross the track at said point and found that a long string of freight cars had been cut in two parts at the path. The first boy got safely through, but the plaintiff caught his foot, fell down, and the cars

coming together at that moment, severed his leg. The court in that case said:

"The contention is that, by the long acquiescence of the defendant company in the use of the paths running up to and crossing their right of way, the public had acquired the right to cross at that point, which the company was bound to take notice of and respect; and that, having cut and opened the train, which was on the westerly track, at the point where the path crossed it, the men in charge of the train, before closing the opening, were bound to give warning, either by some one stationed at the place for the purpose, or by the engine, at the other end, whistling or ringing its bell; and that to bump the cars together without notice, and without regard to whether any one was going across, as was done, was negligence which made the company liable to any one such as the plaintiff, who was injured thereby.

"It is to be noticed that the plaintiff was not struck and thrown down by the sudden movement imparted to the cars, but in some unexplained way his foot was caught by the rail and he was thrown forward; the wheels of the cars coming on him and cutting off his foot, while he lay in that position. It is not altogether the same therefore as if the cars, being suddenly started, bumped into him and threw him down. The accident resulted because he tripped and fell, without which it apparently would not have occurred. But passing this by, if the company, as contended, was bound by long acquiescence to respect this cross-

ing, and after opening the train as it was required, before closing it again, to give reasonable warning, the plaintiff had a right to rely on this, and was entitled to go in between the standing cars, without incurring the danger of being caught by any sudden movement of them. And even though the immediate occasion of the accident was the catching of the plaintiff's foot under the rail, the result is not so remote but that it may be attributed to the neglect of the company, in failing to give due and timely warning, if that obligation in fact rested upon it.

"It is the established rule in some jurisdictions that, where a railroad company for a long period of time has permitted the public to cross or travel along its right of way between certain points, it owes the duty of reasonable care to persons so using it, and cannot approach the place with moving trains without giving due and customary warning. 23 *Amr. & Eng. Cycl. Law* (2 Ed.) 740, 741, This is the rule in Pennsylvania. *Taylor v. Delaware & Hudson Co.*, 113 Pa. 162, 8 Atl. 43, 57 Am. Rep. 446. As it is in New York: *Swift v. Railroad*, 123 N. Y. 645, 25 N. E. 378. See also *Harriman v. Pittsburg, etc. Railroad*, 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507, and *Garner v. Trumbull*, 94 Fed. 321, 36 C. C. A. 361. But it is not the rule in New Jersey, where, under such circumstances, persons using the crossing are regarded as mere licensees, towards whom the railroad owes only the duty of not doing wanton or wilful injury. This is well established, and is illustrated by several cases. Thus in *Vanderbeck*

v. Hendry, 34 N. J. Law, 467, the premises where the accident occurred was a lumber yard, which was uninclosed, and where persons were in the habit of crossing from street to street, making use of the passageways left between the lumber. The plaintiff having gone into one of these passageways was injured by the fall of a pile of lumber, which had been piled up in a negligent manner, and it was held that he could not recover. Being on the premises, as it is said, by mere license, and not by invitation, while relieved thereby from responsibility as a trespasser, he assumed the risk of the place, and the business carried on at it, and the owner owed him no duty except to abstain from acts of wilful injury. This was reaffirmed in *Phillips v. Library Company*, 55 N. J. Law, 307, 27 Atl. 478, where, however, in view of the facts of the case, it was held that a different rule prevails, if the entry or use of the land is of right or by invitation of the owner, as distinguished from an entry by license or sufferance; the owner in the former case being under the duty of exercising ordinary care to render the premises reasonably safe, or at least to refrain from any act that will make the entry or use of the premises dangerous. In *Devoe v. New York, Ontario &* Western R. R., 63 N. J. Law, 276, 43 Atl. 899, the residents along a railroad track which, four years before the accident which resulted in the death of the plaintiff's decedent, was inclosed by a fence along the company's right of way, built a stile over the fence without the consent and notwithstanding the refusal of the company to permit

it, so that they might go directly across the tracks to an adjoining station and a street beyond it. The plaintiff's decedent on her way to school, made use of this stile, and in crossing the tracks of the company, just before she reached the platform of the station, was struck and killed by one of the company's trains; and it was held that mere acquiescence in the passage across the railroad for the benefit or convenience of the parties using it created no duty on the part of the railroad company except to refrain from acts wilfully injurious, and, consequently, that there could be no recovery. So in *Furey v. New York Central & Hudson River R. R.*, 67 N. J. Law, 270, 51 Atl. 505, a painter, who was at work assisting to paint a railroad shed, which covered the central portion of a river pier, while on his way to change his working for his street clothes, which he had left in the interior of the building, was injured by the closing together of two freight cars, between which he was passing, within the shed, which were moved by the company without warning. It was contended that by opening the train and leaving spaces between the cars, as was habitually done in the shed, which spaces were used with the knowledge of the company, by men at work on the job, to cross from one side of the building to the other, there was an implied invitation to the men who use these openings, and that a duty devolved on the company in consequence to give warning before closing them. But this was rejected, and it was held that the company was in no way liable, the openings between the cars being varied from day to day according

to the exigencies of the business, as it became necessary to have a car unloaded at one place or another; and that the fact that the plaintiff and others passed through these openings repeatedly without molestation with the knowledge of the company afforded no evidence or encouragement that the company intended them to use them. Such knowledge, it was said, might imply permission, but did not amount to an invitation, without which element there was no duty on the part of the company to give warning, or in fact to do anything, except to abstain from that which was wilfully injurious.

"The present case does not differ in principle from *Pennsylvania R. R. v. Martin*, 111 Fed. 586, 49 C. C. A. 474, 55 L. R. A. 361, decided by this court, in which the same rule was enunciated. The plaintiff there was injured by something which fell from a passing train, as he was walking along the right of way of the railroad on a customary path leading from a pottery plant, where he was employed in the city of Trenton, to the platform of an adjoining station. This path had been used for a long time by employees of the pottery plant in going to and from their work without objection on the part of the railroad company; and on the occasion in question the plaintiff was going to the station to meet a friend, who was coming in on the train. It was contended that, under the circumstances, he was not on the defendant's right of way by mere sufferance, but by implied invitation; but it was held that the acquiescence of the company in the adoption of the path along the right

of way, as a means of going to and from the station, did not invite passengers or others having business there to make use of it, and did not therefore impose upon the company any duty beyond what it owed to a mere licensee. See, also, *Sutton v. West Jersey R. R.*, (N. J. Sup.) 73 Atl. 256; *Riedel v. West Jersey R. R.*, (C. C. A.) 177 Fed. 374.

"These cases which are declaratory of the local law as established by a long line of decisions of the highest courts of the state, recognized and enforced in this court, are conclusive upon the plaintiff, and require an affirmance of the judgment. Assuming that there was a customary path, leading up on either side to the railroad tracks where the accident occurred, by which the people of the neighborhood were wont to pass across these uninclosed lots and that this had existed for such a length of time that the company was affected with notice and presumed to acquiesce in it, the use was merely a permissive one, which under the New Jersey law imposed no higher duty than not to do that which was recklessly or wilfully injurious. Nor was this duty modified by the fact that, on the occasion in question, the train which was occupying one of the tracks, and which was the cause of the accident, had been opened at the point where the paths converged, which fact cannot be wrested into an invitation or allurement to the plaintiff to go in between the cars in the course of crossing over, so as to require a warning from the trainmen in charge before closing the cars together. The use was still merely a permissive one, and the

plaintiff stood in no higher relation to the company than that of a licensee, who took all the ordinary risks incident to the place and the business, among which was the moving or shifting of the cars occupying the track, back and forth upon it, according as it became necessary. The plaintiff therefore had no case, and a verdict for the defendant was properly directed.

"Judgment affirmed."

One of the leading cases pertinent to the ones at bar and cited in numerous subsequent decisions by the courts of various states, is that of:

Cleveland, C. C. & St. L. Ry. Co. vs. Tartt, 64 Fed. 823.

The court, at page 826, lays down the law governing such a situation as follows:

"The decedent, accompanied by his son, was, when killed, walking on or dangerously near to to the track of the company. He was not on or near any highway or street crossing. He was traveling along the right of way for his own convenience, without any invitation, express or implied, and with knowledge of the danger to life and limb from passing trains. It is true that he was killed while attempting to rescue his son from impending peril, but he had, by his own voluntary act, brought his son into a situation of danger, which gave rise to the peril. The only excuse offered for such conduct was that the defendant had suffered other people to travel along its right of

way without interference or objection. He was traveling upon the defendant's right of way, not for purpose of business connected with the railroad but for his own convenience, as a footway, in reaching the village of Venice. The right of way was the exclusive property of the defendant, upon which no unauthorized person had the right to be for any purpose. It was a place of known danger, and there was nothing to exempt the decedent from the character of a wrongdoer and trespasser in traveling along the right of way further than the implied consent of the defendant arising from its failure to interfere with the previous like practice by others. But because the defendant did not enforce its rights, and warn people off its premises, no right was thereby acquired to use its roadbed as a place for public travel. At most, it was used by sufferance, which amounted to no more than a mere naked license, and imposed no obligation on the part of the owner to provide against the danger of accident. The person who used the right of way for his convenience went there at his own risk, and enjoyed the implied license with its attendant perils. *Elevator Co. v. Lippert*, 18 U. S. App. —, 11 C. C. A. —, 63 Fed. 942. The decedent, then, stood in no more favorable position than that of a wrongdoer or trespasser. He was at the time of the accident in the exercise of no legal right, and at most was in the enjoyment of a naked license implied from the previous use of the right of way by others; and the rights and obligations of the decedent and the company are to be measured as in the case of par-

ties thus situated. Where both parties are equally in the position of right which is enjoyed by each independently of the other, the plaintiff is only bound to show that the injury was occasioned by the negligence of the defendant, and that he exercised ordinary care to avoid it. But where the plaintiff is a wrongdoer or a trespasser, or is in the enjoyment of a naked license for his own convenience, without any invitation, express or implied, from the owner of the premises, he cannot maintain an action for an injury without averring and proving that the injury was wilfully inflicted, or that it was caused by negligence so gross as to authorize the inference of wilfulness. As he was a trespasser, no action will lie against the company for causing his death unless the act of its employees in charge of the train was wilful. A trespasser cannot maintain an action where the tort complained of consists of nothing more than the omission to exercise care. *Railroad Co. v. Graham*, 95 Ind. 286; *Pennsylvania Co. v. Sinclair*, 62 Ind. 301; *Palmer v. Railroad Co.*, 112 Ind. 250, 14 N. E. 70; *Beach, Contrib. Neg.*, (2d Ed.) §§ 198-201, 203. In the case of *Railroad Co. v. Godfrey*, 71 Ill. 500, it is held that the right of way of a railroad company is its exclusive property, upon which no unauthorized person has a right to be for any purpose, and that any one who travels upon it for his own convenience is a wrongdoer and trespasser; that the mere acquiescence of the company in the use of its right of way by persons passing along for the purposes of travel does not give such persons a right of way over the track, nor is the

company bound to protect or provide safeguards for persons so using it; and that a person so traveling along the right of way, where he is liable to come in collision with a passing train, is guilty of gross negligence, and he cannot maintain an action for an injury received while so traveling without averring and proving that the injury was wilfully or wantonly inflicted, or that the negligence of the company was so gross as to justify the inference of wilfulness. In the case of *Railroad Co. v. Hetherington*, 83 Ill. 510, it is held that, where an ordinance of a city prohibits railway companies from running their trains in the city at a greater rate of speed than six miles an hour, the running of a train at a rate of fifteen miles an hour, resulting in the death of one wrongfully upon the track, will not make the injury wilful on the part of the company. In the case of *Blanchard v. Railway Co.*, 126 Ill. 416, 18 N. E. 799, it is held that, where a person is killed by an engine or train while wrongfully on a railroad track—as, where he is walking thereon for mere convenience or pleasure, not at a public crossing—he is guilty of such gross negligence as to preclude a recovery by his personal representatives against the company operating the engine or train, unless his death is caused wilfully or wantonly, or the company is chargeable with such gross negligence as is evidence of wilfulness. The case of *Railroad Co. v. Mehlsack*, 131 Ill. 61, 22 N. E. 812, affirms the same doctrine. In *Johnson v. Railroad Co.*, 125 Mass. 75, it is held that a person injured while trespassing on a railroad track, by coming in col-

lision with a train, is guilty of negligence which, as matter of law, will preclude his maintaining an action therefor unless the injury was wilfully inflicted. This doctrine is affirmed by the same court in cases too numerous to justify citation. Such is the settled law in other jurisdictions. *Railroad Co. v. Munger*, 5 Denio, 255; *Chrystal v. Railroad Co.*, 105 N. Y. 164, 11 N. E. 380;*Cusick v. Adams* 115 N. Y. 55, 59, 21 N. E. 673; *Heil v. Glanding*, 42 Pa. St. 493; *Gillis v. Railroad Co.*, 59 Pa. St. 129; *Railroad Co. v. Filbern*, 6 Bush, 574;*Canal Co. v. Murphy*, 9 Bush, 522; *Railroad Co. v. Depew*, 40 Ohio St. 121; *Railroad Co. v. Houston*, 95 U. S. 697."

There is no question as to the facts in the cases at bar, and in view of the law laid down in the above decisions, it is manifest that the court erred in not granting a non-suit at the close of the plaintiff's case, and in not granting a directed verdict at the close of all the testimony in said cases. The facts show, by the testimony of the father, that the injured boy was a very bright lad, and plaintiff's exhibit 4 was introduced to show that he was very proficient in school. (R. p. 85.) He had been going over the track to the dump pile for a year. (R. p. 88.) He had been warned by his parents to look out for cars around there. (R. pp. 87, 88.) The track over which he attempted to pass at the time of the accident was the one most used of any

in the whole yard, being often used as many times as a hundred a day. (R. p. 124.)

To digress a moment, we wish to call the court's attention to the fact that the testimony shows without dispute that the defendant's employees had been using this track for many years ever since it was constructed just as they were using it that day, and no accident had ever occurred previously. (R. pp. 90, 125.) There is but one of two conclusions from such facts: Either the track was not crossed as extensively as plaintiff would have the court believe, or that people using same were very careful to avoid it when there were any railroad men around. But this is of little consequence under the law as laid down in the state where the cause of action arose. Under that law the deceased boy was but a licensee on the switch track, and the plaintiff could recover only for wantonness or wilfulness on the part of the defendant, and it is conceded that neither was shown.

One of the best recognized text books upon this subject is Elliott on Railroads. In volume 3, §1154 of said text we find the rules governing situations of this kind as follows:

"Yet, although the place is used repeatedly and frequently as a crossing with the mere silent ac-

quiescence of the company, or with the knowledge and simply passive permission of the company, it would seem that the traveler who uses it is at most a bare licensee, who takes his license with all its concomitant risks and perils, and as a general rule, the company owes him no duty greater than that which is due to a trespasser. In order to impose upon the company the duty to treat a place as a public crossing, those who use the place as a crossing must either have a legal right to so use it, or must use it at the invitation of the company, and 'neither sufferance, nor permission, nor passive acquiescence' is equivalent to an invitation. If, however, the traveler uses a place as a crossing by invitation of the company, it must use ordinary care to prevent injury to him, as, where the company constructs a grade crossing and holds it out to the public as a suitable place to cross. Where by fencing off a foot way over its tracks it induces the public to so use it, by building to the track plank bridges for foot passengers, or by constructing gates in the railroad fence for the use of pedestrians who habitually cross the track, it thereby holds out the place as proper for them to use. Such invitation as imposes on the company the duty of ordinary care is implied, where by some act or designation of the company persons are led to believe that a way was intended to be used by travelers or others having lawful occasion to go that way, and the company is under obligation to use ordinary care to keep it free from danger. There is much conflict of authority as to what constitutes such a general use of a place as a cross-

ing or such recognition of the right to use such a place as will impose upon the company the duty of observing the precaution required at public crossings, but we think the doctrine we have expressed is the true one supported by the best reasoned cases and by the recognized principles of law. The opposite view has been taken in a line of cases in which it is held that if the place has been used as a passageway for a long period of time and this use is with the knowledge and permission of the railroad company, it is its duty to treat it as a highway, and that where the railroad company licenses the public to make a general use of a crossing over its track, it can not treat a person who walks upon it as a trespasser, but some of these decisions seem to impose upon the company a greater duty than is due to a bare licensee, and the traveler is no more than a bare licensee, unless he has a legal right to be on the track, or is there by invitation of the company."

A great mass of cases supporting the above proposition is cited in the notes in said text.

The place where the accident happened in the cases at bar was not in a thickly populated part of the city, but out in the switch yard, at least five blocks from any houses. (R. p. 50.) There was nothing to indicate that such a place was a crossing, as there were no planks laid between the rails for the convenience of foot passengers, and it was only with the utmost difficulty that people could

cross the track with a vehicle, such as the one propelled by the boys on the day of the accident.

In view of all the evidence, we do not feel that we are asking so much to set aside the verdicts as to revoke donations which it was not within the power of a well-meaning jury to bestow.

II

Contributory Negligence of Deceased and Parents was the Proximate Cause of the Accident and Should Bar Recovery

Seldom is one cited to such glaring acts of negligence on the part of parents seeking to recover damages, and on the part of the decedent, than in these cases. The parents, who are beneficiaries under these actions, by their own admissions, took their children, including the decedent, to the switch track at or near the place of the accident, and directed and permitted them to crawl over and under the couplings between the cars (R. pp. 87, 106, 107), and, as the mother testified at the coroner's inquest, right under the cars. (R. p. 112.) Just imagine the example of recklessness and total disregard for their safety that was set by the parents! The father admitted upon cross-exam-

ination that he knew the track was used a great deal (R. p. 88), and with that fact in mind, the parents not only permitted the children to crawl between the cars, but encouraged them in doing so by doing the very act themselves. Is it any wonder that this boy was struck by a car that only moved two feet (R. p. 94), after being accustomed to such examples of reckless disregard for one's safety?

The decedent was a bright boy of twelve years; the only person now living who was present—the other boy, ten years of age at the trial—testified that when they reached the track they looked and listened. The decedent was old enough to appreciate the fact that looking toward the end of a string of boxcars which end could not be seen, gave no assurance that there was no engine attached to that end. This boy was not a country boy, unaccustomed to a railroad and its operation. The decedent had lived for years within a couple of blocks of the tracks and had been going over the very place he was injured for a year, and knew that the switch track was used very frequently, yet with that knowledge and experience he endeavored to cross the track right up against the last car in a long string, with one of the most awkward vehicles to handle—a wheelbarrow—when

for a distance of at least three hundred feet, or clear to the First avenue trestle, he had an unoccupied track at any point of which he could have crossed in safety. (R. pp. 93, 94, 95.) This was not a case where the decedent was called upon to act on the instant, or where trains were passing causing great confusion. He stepped from a place of safety beside the track upon the track and immediately against the car. If he had been exercising the care and caution testified to by the younger brother, both of them would have heard the noise created by the cars bumping together for a considerable length of time before the last car moved.

The court in the case of *Wallace v. New York N. H. & H. R. Co.*, (Mass.) 42 N. E. 1125, in passing upon a similar case said:

"Everybody knows that it is physically impossible for a long freight train to back up in such a way as to move the rear car suddenly and quickly, without giving warning of what is to be expected by the previous movement of the locomotive and the cars near it."

In the case of *Olson v. Payne, supra*, the contributory negligence of the plaintiff was not a bit more pronounced than that of the decedent in the cases at bar.

III

Error in Admission of Testimony

W. H. Barr, a witness for the plaintiff, had at one time served the defendant as yardmaster at Argo. The testimony, however, showed that he had not worked for the defendant for at least four and possibly five years previous to the accident. (R. p. 99.) The court, however, allowed him to testify that he had some knowledge that the public was using the path. (R. p. 97.) It is quite evident that in allowing this testimony to go to the jury, the trial court committed prejudicial error, in view of the fact that the witness had left the employ of the defendant so many years before the accident occurred, and such testimony for that reason was immaterial in the highest degree. Counsel for plaintiff may contend that he had answered the question just a moment before, but it was evident to all that the jury did not hear him, and when same was repeated, the question was objected to, as is seen in the record.

IV

Error in Refusal of Instruction

If under any theory of this case, the same should have gone to the jury, the court committed preju-

dicial error in its refusal to give the following instruction:

"The court instructs you that if you find from the evidence that a footpath across defendant's track No. 12 was acquired by user and that a person traveling on same across said track was not a trespasser, you are further instructed that any material deviation from said footpath in crossing said track would constitute the party making such deviation in crossing said track a trespasser thereon." (R. p. 160.)

In the case of *Southern R. Co. v. Fisk*, 159 Fed. 373, this very question was passed upon by the Circuit Court of Appeals. The fourth paragraph of the syllabus of said case reads as follows:

"In an action for injuries to a boy being run over by the defendant's train just outside the line of a street crossing, whether plaintiff in the position he had taken was a trespasser, or whether he had not so far departed from the highway as to deprive him of the rights of a traveler, held for the jury."

In that case the facts show that the plaintiff had only departed from a legitimate street crossing a distance of from two and a half to six feet, while in the cases at bar the decedent had left the alleged path for almost a box car length. The court in the Fisk case, *supra*, at pages 376, 377, says:

"While the company may be chargeable with notice to guard against injury at the highway crossing, and with corresponding duty in its operations there, no such notice or duty is implied in the case of the trespasser, not at or near a public way, and thus gives rise to the separate rule, to be defined under the next proposition. In the view above stated, the defendant was not entitled to direction of a verdict in his favor, as a conclusion of law under the testimony, that the plaintiff was in the relation of trespasser when injured; and error is not well assigned for the denial of the motion and instructions requested upon that theory. The issues raised were purely issues of fact for determination by the jury. If the plaintiff was unmistakeably attempting to cross the tracks upon the street crossing, and his deviation was accidental, as stated in the direct testimony, he was within the benefits of such crossing rule; for the exercise of reasonable care in the movement of the train, measured by the conditions which were either known or within the observation of the engineer and trainmen, and thus unaffected by the rule as to trespassers. On the other hand, if circumstances appeared which indicate that he was not attempting to cross upon the street, as the defendant contends —and we deem no expression of opinion thereon, under the present testimony, needful or proper— raising a question of fact whether he so entered as a trespasser and thus assumed the risks incurred by such entry, that issue, as well, was for the jury to determine and apply the rule of law which then became applicable."

Clearly such a question as the extent of the deviation in the cases at bar was a matter calling for the instruction submitted by the defendant, and it was prejudicial error on the part of the court not to give same.

V

Error in Rendering and Entering Judgments, Because All the Complaints are Fatally Defective

Under the common law, there is no right to recover damages on account of anyone's death. There are in the State of Washington two statutes that have allowed recovery, where the facts warrant it, for the heirs and beneficiaries of the deceased.

Sections 183 and 183-1, Remington's Compiled Statutes of Washington, 1922, provide as follows:

"When the death of a person is caused by the wrongful act, neglect or default of another his personal representative may maintain an action for damages against the person causing the death; and although the death shall have been caused under such circumstances as amount, in law, to a felony.

"Every such action shall be for the benefit of the wife, husband, child or children of the person whose death shall have been so caused. If there be no wife or husband or child or children, such action

may be maintained for the benefit of the parents, sisters or minor brothers, who may be dependent upon the deceased person for support, and who are resident within the United States at the time of his death. In every such action the jury may give such damages as, under all circumstances of the case, may to them seem just."

Section 194 of Remington's Compiled Statutes provide as follows:

"No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine, by reason of such death, if he have a wife or child living, or leaving no wife or issue, if he have dependent upon him for support and resident within the United States at the time of his death, parents, sisters or minor brothers; but such action may be prosecuted, or commenced and prosecuted, in favor of such wife or in favor of the wife and children, or if no wife, in favor of such child or children, or if no wife or child or children, then in favor of his parents, sisters, or minor brothers who may be dependent upon him for support, and resident in the United States at the time of his death."

The latest construction of the above statutes is found in the case of *Howe v. Whitman County*, 120 Wash. 247. That was an action brought by two minor children, through their mother, as guardian *ad litem*, and also in her individual capacity as the widow of H. B. Howe, against one Peter Zounick

and Whitman County to recover damages against the defendants as joint tort feasors on two causes of action. The first cause of action was for damages for pain and suffering sustained by the deceased from the time of his injury to the time of his death. The second cause of action was for damages through loss by death of H. B. Howe. The trial resulted in a verdict for the plaintiff in both causes of action against the county. The court in affirming judgment for the plaintiff on the first cause of action, and reversing judgment upon the second cause of action, said, on page 258:

"Section 183 (of old code) is exxpressly repealed by the act of 1917, ch. 123, p. 495, which now provides that actions for such wrongful death can only be prosecuted in behalf of the beneficiaries by the personal representative of the deceased. Section 194 gives no right of prosecution of an action by the personal representatives, but only gives the right to prosecute by the heirs and beneficiaries therein named. . . . .

"The damages alleged in the first cause of action set up in respondents' complaint could only be recovered by them in their personal capacity, under sec. 194, Rem. Comp. Stat. The damages claimed in the second cause of action could only be recovered in a representative capacity under ch. 123, Laws of 1917, p. 495; Rem. Comp. Stat. secs. 183-183-3."

As heretofore stated, in the cases at bar there have been three sets of complaints filed, viz: Complaints (R. pp. 2 to 11 inclusive), amended complaints (R. pp. 25 to 35 inclusive), and second amended complaints (R. pp. 35 to 45 inclusive).

After the complaints were filed the defendant interposed a demurrer to each one (R. pp. 12, 13), each of which was overruled by the lower court. (R. p. 14.) However, during the trial the court called the attention of counsel for plaintiff to the fact that in his opinion the parties plaintiff in each case had no capacity to sue. Amended complaints were then prepared and filed, bringing one action by the personal representative and the other by the parents. However, both amended complaints laid the causes of action therein set forth under section 194, Remington's Compiled Statutes, that is, the one relating to damages for pain and suffering. (R. pp. 29, 34.)

On February 16, 1923, more than a month and a half after the rendering and entry of judgment in cause No. 7018 below, second amended complaints were filed, bringing both actions by the personal representative, though the verification to the amended complaint in 7018 is made by the father in his per-

sonal capacity. It is very evident upon the face of the complaint that if the plaintiffs were correct in their contention that the party plaintiff in each action is the correct one, there would have been no necessity for preparing and serving two complaints, when one complaint would have served the purpose by setting up two causes of action. From an examination of the record in these cases, it is very evident that at no time has there been any complaints, amended or otherwise, sufficient to sustain a judgment in either case.

For the reasons above submitted, we contend that the judgments should be reversed.

Respectfully submitted,

W. H. BOGLE,
F. T. MERRITT,
LAWRENCE BOGLE,
LANE SUMMERS,
E. I. JONES,
Attorneys for Plaintiff in Error.